In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5746

FRANK ALVAU and HUMBERT ROSSI,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellee

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STATEMENT OF THE CASE

The defendants herein were indicted in three counts for the violation of Sections 3266, 3281 and 3282 Revenue Statutes of the United States. Count I of the Indictment charged the defendants with the fermentation of one thousand gallons of mash fit for dis-

tillation; Count II charged them with operating a still in a dwelling house; and Count III charged them with operating a still without bond.

The evidence, as shown by the Bill of Exceptions in the records (Tr. 93), shows that on the twelfth day of July, 1928, prohibition agents went to the premises of Frank Alvau, which premises are located in King County between Seattle and Tacoma at a place called Redondo, arriving there early in the morning. When several hundred yards from the defendant's house, the agents smelled the odor of mash emanating from the premises. On nearing the house and barn of the defendant Alvau, the agents smelled the kerosene burners on the still. A complete still was found in a full concrete basement and still-room which concrete basement and still room were under a lean-to, and set out from the rest of the house, and the only means of entrance to the still room was through a small door about two feet wide leading from the basement to the still room. The officers searched defendant Alvau's home and after some time discovered the still room. The still door weighed about five hundred pounds, and Alvau explained to the officers how he got the still into the still room. The officers testified that the still room was off to one side of the house. A

large quantity of mash was found in the still room, together with a still and some moonshine whiskey found in a barrel.

Defendant Alvau did not take the stand in his own behalf, but defendant Rossi, who was found in the still room by the officers at the time of the search, which search was made without a search warrant, testified that he was Alvau's guest and went to Alvau's home for the purpose of selling Alvau and his family some insurance policies.

Before the officers went into the house they smelled the odor of mash and discovered a mash refuse pool or sump pit (Tr. 99).

By timely motion, defendant Alvau moved, prior to trial herein, to suppress the evidence, on the ground that his home had been illegally searched the evidence used in this trial illegally obtained because the officers had no warrant. In his petition to suppress, which was renewed by Alvau at the time of trial, and in which Alvau was the sole petitioner, defendant Rossi did not join. At the time the Government's exhibits which were mash, whiskey, and portions of the still, found on Alvau's premises were offered in evidence,

counsel for the defendants objected to their admission. The case is now before this Court on the question of the legality of the search and seizure.

Following are the specifications of error relied upon by the appellants to sustain their appeal.

ARGUMENT

As to the defendant Rossi, it will be seen by this Court at once that none of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were impaired or in any way violated, because he failed to join in the petition to suppress, which was interposed by his co-defendant, Frank Alvau (Tr. 5), and for the further reason that an examination of the entire record will show that at no time did he assert any interest, either in the premises that were searched or the articles that were seized.

Defendant Rossi testified (Tr. 124-125) that he had been invited to Alvau's place to stay for the evening when arriving there late one night on a mission of selling insurance to the Alvaus. He stated that he

heard the prohibition agents early in the morning and thought they were burglars, and therefore went down and hid in the still room. In this manner he attempts to account for the guilty situation in which he was found, to-wit: his appearance in the still room when the same was searched by the officers and the fact that he had mash on his clothes. Nowhere in the record will be found any affidavit, petition, or sworn oral testimony on the part of the defendant Rossi that he had any interest in the property seized or the premises of Alvau that were searched.

It has frequently been held that where the defendant denies jurisdiction over premises searched and denies ownership of the property found on such premises, he is not in a position to raise the question that the search and seizure were illegal and unlawful. *McMillan vs. United States*, 26 Fed. (2nd) 58; *Graham vs. United States*, 15 Fed (2d) 740; *Cantrell vs. United States*, 15 Fed. (2d) 952; *United States vs. Gass*, 14 Fed. (2d) 229. It has also been held that evidence obtained as the result of violating the right of privacy of one defendant through search and seizure without a legal warrant did not render it admissible against a co-defendant. Inasmuch as no motion to suppress was filed on the part of Rossi prior to the time the

case was called for trial, or at any time, the legality of the search and seizure cannot therefore be properly questioned by him. *Harkline vs. United States*, 4 Fed (2d) 526; *Souza vs. United States*, 5 Fed. (2d) 9; *Weeks vs. United States*, 232 U. S. 383, 58 L. Ed. 652.

The petition to suppress in the instant case, interposed by the defendant Alvau, it is contended by the Government, is fatally defective because it does not assert defendant Alvau had any interest at any time in the articles which were seized and offered in evidence in the instant case at the time of trial and admitted in evidence by the Court. As stated hereinabove, it is elementary that where a petition to suppress does not assert an interest in the articles seized, the question of the infringement and impairment of the defendant's constitutional rights, if any, under the Fourth Amendment, cannot be considered. The defendant Alvau's petition to suppress in the instant case is therefore fatally defective. *Shields vs. United States*, 26 Fed. (2d) 993; *Heywood vs. United States*, 268 Fed. 795.

Appellant Rossi's fourth assignment of error states that the Court erred in refusing a directed verdict for Rossi because he was not required to file a bond nor to pay the taxes charged in Counts II and III

of the Indictment herein, and that the evidence, if it showed at all that he was implicated in the crime charged, showed that he was an aider and abetter, and not being the principal could not be liable for the taxes and the bond as charged in said Counts

We think a recent decision of this Court shows the fallacy of defendant Rossi's contention that because he was not a principal he therefore could not be guilty of operating the still in question without a bond. In *Vukich vs. United States*, 28 Fed. (2d) 666, wherein the defendant was charged with running a still without a bond, it was held that where he knowingly delivered supplies to an unlawfud distillery, he was liable as a principal for aiding and abetting in an unlawful business, and was therefore guilty as a principal of running the still without a bond. The instant case, it seems, is in all fours with the *Vukich* case. Moreover the evidence as to Rossi and his participation in the crime charged was ample to go to the jury, for he was found by the officers at the time of the search in the still room with mash on his clothing, and when asked to turn on the light for the officers, he did so. (Tr. 130).

It is attempted in the brief of counsel for the defendants, to discredit the testimony of prohibition

agents by showing inconsistencies between their oral testimony in Court and their affidavits, and the testimony before the UnitedStates Commissioner, at which hearing it was sought to have the evidence introduced in the present case suppressed. However, it is a well-settled rule of the law that exparte affidavits prepared for signature of witnesses have not the same evidentiary value as sworn testimony of the same witnesses in open court. *Lindsay vs. United States*, 7 Fed. (2d) 248. Moreover the transcript of the testimony before the United States Commisioner, although a part of the transcript of the record herein, is not properly a part of said transcript and being not properly before this Court because not admitted in evidence or incorporated in the Bill of Exceptions, the same cannot be considered now by this Court. *King vs. United States*, 1 Fed. (2) 931. The record shows that the trial judge refused to admit in evidence one of defendant's exhibits which was the testimony before the commissioner attached to the petition to suppress. (Tr. 134).

It is contended by counsel for the appellants in this case that the trial Court erred in refusing to rule on defendant's motion to suppress until all the evidence was in at the time of trial. Counsel's contention on this point has no merit, for it was recently decided by this

Court that it was proper procedure for the trial judge to defer ruling on a motion to suppress interposed prior to the trial until all the evidence was heard. *Poetter vs. United States*, 31 Fed. (2) 138.

The argument in main in this brief will be divided into two points: First, that the evidence adduced at the time of the trial herein showed that the portion of the premises where the still was found was not in fact a part of the house although entered through the house, and that that portion of the premises where the still, mash and whiskey were found was used in part for business purposes which would take it out of the dwelling house catagory under Section 25 of the National Prohibition act, and that the search and seizure was therefore legal, because although the officers at the time of such search did not have evidence of sale they had probable cause to believe a crime was being committed in ther presence. Second, the officers have a right to enter any building in the day or night in their capacity of internal revenue agents to look for, inspect and examine illicit or illegal distilling operations and apparatus.

I.

Agent C. H. Griffith testified that at a point five hundred yards, and possibly more, from the house he smelled the odor of fermenting mash, and that he first went to the barn but there was nothing there. Going on around the barn, between the house and the barn, he then could strongly smell the odor of mash and could hear the kerosene burners. He stated that he heard someone running across the basement floor as he pushed the basement door in with his shoulder and that he saw, before he entered the house, a sump pit at the side of the house for the disposal of mash, and smelled the mash coming out of the pit. It was steaming mash, he stated. (Tr. 98).

He further testified (Tr.98) that the house was set upon a knoll and that there was a full concrete basement under the house, a back door and a front door; that the still house was out to one side and that the vault door lead out of the basement into a two-story still house built of concrete about eight inches thick; that the door of the still room was two feet in diameter. None of it was under the main part of the house. There was a little lean-to built out to the rear,

running along the basement steps, and this little lean-to was over the still house. Vegetables and groceries were stored on this lean-to or porch (Tr. 100). The still room was on an off-set from the house, he testified, and there was nothing over it except a lean-to porch. (Tr. 101-103).

Agent H. E. Carr testified that the wall between the basement and the still room was six inches thick, and the entrance from the still room to the basement was about two feet in diameter, and the still was about the same width. (Tr. 104). He further stated that the part called the still room was outside and protruded out from the foundation of the house (Tr. 105). He stated, also, that there was a tunnel dug under the floor of the basement to the chimney of the house, which ran the entire depth of the house, and another tunnel from the right side of the still house to a well about fifty feet distant, which was a fresh air vent.

Agent Carr further testified (Tr. 104), that in the first room in the still house was a five-hundred gallon vat of steaming mash, and the dome of the still coming up from the floor below. In another corner was a manhole leading to the room below. In this room there was another five hundred gallon vat of mash, and to

the right were two fifteen-gallon pressure tanks embedded in concrete.

It is apparent from the record herein that the portion of the house where the distilling apparatus was found, if a portion of the house at all, was used in part for business purposes. There was no entrance to the house proper from the still house except through a small aperture two feet wide. There was a thick wall between the still room and the basement of the house proper, and the door from this was only a small aperture two feet in diameter. There was in this case, therefore, evidence upon which the trial judge could find that the place where the still was found did not comprise any portion of the dwelling of Alvau at all, and that if it did constitute a part of the dwelling it was used for business purposes.

We are familar with the Bell, Temperani, and Schroeder cases, in which this Court, with Judge Gilbert dissenting, held that the mere fact that manufacture of intoxicating liquors was being carried on in a dwelling house does not render the same a place used in part for business purposes. Here, we have a situation unlike that in either the Bell, Temperani and Schroeder cases. Of course, it is believed by the writer

of this brief that Judge Gilbert's dissent is the three cases mentioned above is unanswerable, but that question is now no longer an open one.

A case on all fours with the instant case and one which was decided by this Court, is the case of *Forni vs. United States*, 3 Fed. (2d) 354, which was cited by Judge Gilbert in his dissent in the Schroeder case, and also cited later by the United States Supreme Court in the case of *Steele vs. United States*, 267 U. S. 498. In the *Forni* case, the defendant lived in the building which was searched and liquor found in the basement thereof. The officers stated in their affidavits that there was no means of ingress or egress from the basement to the other portions of the building, that they had seen the liquor in said basement or garage. It was said that it was a question for the court to decide whether or not the place searched was a dwelling or part of the same, and whether or not it was used for business purposes. The evidence was held sufficient to support a finding that the basement of the dwelling in which the defendant resided was used for business purposes and was lawfully searched, even though there was no evidence of sale.

In *Dowling vs. Collins*, 10 Fed. (2d) 62, a search of the basement of the defendant's residence was held

valid for the officers had probable cause to believe that in said basement the defendant was running and operating an office for the transaction of the business of a distillery, and the placed searched was therefore used in part for business purposes and not occupied solely as a private dwelling.

In *United States vs. Mitchell*, 12 Fed. (2d) 88, it was held that a frame lean-to built at the back of defendant's residence and attached thereto by carpentry, but having no door opening into the dwelling was not a part of the dweling house, and there would be nothing to militate against the search and seizure thereof without a warrant. In the Mitchell case the Court stated:

> "Taking up these contentions in reverse order, I cannot agree with the government upon the broad contention made by them that the mere presence of mash, whisky, and a still in a private residence deprives it of the character of a private dwelling, though these facts may, when considered with the other evidence, be sufficient to support the inference that the place is being used for the purpose of sale, or for the business of manufacture for sale. Monaghan v. U. S. (C.C.A.) 5 F. (2d) 424; In re Mobile (D.C.) 278 F. 949; U. S. v. Goodwin (D.C.) 1 F. (2d) 36-38; Temperani v. U. S. (C.C.A.) 299 F. 365.
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> "Whether the precise facts of this case satisfy the requirements of the proof necessary to sus-

tain an issue of this kind, it is not necessary for me to decide; for I think it clear that point (b) is well taken, and, if true, the fact that children may make their beds on the ground in the mash house, like pigs in a sty, would have no efficacy to convert this place into a dwelling, any more than if the defendant let them sleep in a sty or any other of his outhouses, for it is the dominant, and not the incidental, use of a place that determines its character as a dwelling. Besides, I do not believe, though the defendant swears to it, that he lets his children sleep in such a place. I think, rather, the exigencies of his legal situation have driven his testimony too far."

In *Miller vs. United States*, 9 Fed. (2d) 382, (9th C.C.A.), it was held that where the officers saw through an open door into the dwelling of the defendant, wines and kegs, and raisins and sugar, they had visible evidence of a crime being committed in their presence and therefore no warrant was necessary. The Miller case was cited by Judge Gilbert in his dissent in the Schroeder case, and the case of Dowling vs. Collins, supra, was also cited by Judge Gilbert in his dissent in the Schroeder case.

In the case of *Koth vs. United States*, 16 Fed. (2d) 61, (9th C.C.A.), a case in which Judge Dietrich was the trial judge, it was held that the smell of intoxicating liquor emanating from a shed which was searched and which was not in a dwelling house, was

sufficient probable cause to warrant the officers making a search and seizure.

The trial judge, on the question of the competency of evidence, where the validity of the search and seizure is questioned, is the sole judge of the credibility of the witnesses and the importance or weight which he desires to give to their testimony. *Poetter vs. United States*, supra; *Marsh vs. United States*, 29 Fed. (2d) 172; *Jankowski vs. United States*, 28 Fed. (2d) 800.

The officers in the instant case smelled the odor of mash and kerosene burners before they entered the defendant's still house, and seeing a refuse or sump pit for the disposal of mash outside the house before entering the same, had probable cause to believe a crime was being committed and therefore had a right to enter and search the still house without a warrant. *Vachina vs. United States*, 283 Fed. 35; *McBride vs. United States*, 284 Fed. 416; in re *Mobile*, 278 Fed. 949; *Garske vs. United States*, 1 Fed. (2d) 620; *Steele vs. United States*, 267 U. S. 503; *Miller vs. United States*, supra.

The burden in the instant case was upon the defendants to show that the place where the distilling

operations were carried on was not used in part for business purposes. *United States vs. Goodwin*, 2 Fed. (2d) 36. This burden, the trial court found, the defendants had not sustained, and it was within his province so to find, as he was the sole judge of the credibility of the witnesses, and the importance to be attached to their testimony with reference to the competency of the same. *Marsh vs. United States*, supra; *Jankowski vs. United States*, supra. The search and seizure was therefore legal.

II.

The prohibition agents, at the time they entered the appellant's house, being clothed with the powers of Internal Revenue Agents, were acting under the authority of the Internal Revenue laws. *Maryland vs. Soper*, 270 U. S. 31. The Internal Revenue statutes of the United States impose certain taxes upon distilling apparatus and breweries, manufactories and distilleries and their products and sales. They also give the right to Internal Revenue agents to enter buildings or places where distilling or brewing is carried on, and confer the right, also, to enter a building where any

such articles or objects subject to tax may be produced or kept, to examine them and to assess taxes collectible on said articles, and to invoke the statutory right given to the Government for forfeiture of any such articles on which the statutory tax is evaded. 26 U. S. C. A., Secs. 92, 193, 202, 504, 506, 509, 525. These statutes were re-enacted by the Willis-Campbell Act.

Contrary to appellant's contention, Judge Bourquin alone is not the only court which holds that Federal prohibition agents have the powers of Internal Revenue agents, and, being clothed with such powers they have the right, day or night, to enter any premises where distilling is being carried on to inspect the apparatus and location, and when engaged in such official duty, may seize articles used in unlawful liquor operations and search for the same. *United States v. Hilsinger*, 284 Fed. 586.

In *United States vs. Page*, 277 Fed. 459, it was held that Internal Revenue officers have a right to enter any distillery or premises used as such, without a search warrant, either in the daytime or night time, and that as a corollary of such right they are entitled to break into a building wherein they believe a distillery or distilling apparatus is located, at any time of

the day or night. In that case, the court speaking of Prohibition agents as Internal Revenue officers, stated:

> "Section 3376 R. S. gives the right to Revenue officers to enter a distillery without a search warrant as a matter of course and if entry be obstructed, to force entry, or break into the building, either in the daytime or night time, and this right is given in order that certain searches and seizures may be made also without search warrants. See, for instance, Section 3453 R. S. regarding seizure of certain articles. See also Section 3477 R. S. giving Revenue officers the right to enter in the daytime or night time, any building wherein the officer has reason to believe there is distilling apparatus or a distillery, without the premises being open. Such right of entry does not, by clear implication, require a search warrant, at least in the case of cigar factories, rectifying plants, distilleries and such establishments. It seems clear that he can and he should 'without a search warrant' in some instances make the search and seizure authorized by Section 3453."

There have been frequent cases of other Government inspectors and officers, such as oleomargarine inspectors, meat inspectors, bank examiners, and others who are entitled under the statutes and decisions to lawfully enter places of business and places used as such, and premises used as manufactories without the authority of any search warrant, and it is elementary that they are vested by law with summary powers. Their powers and rights are no different than

those of a Prohibition agent, who, being clothed with the powers of an Internal Revenue agent, searches a dwelling house where distilling operations are being carried on. The rights of oleomargarine inspectors, meat inspectors, national bank inspectors, etc., as stated above, in their summary powers in search and seizure cases have been upheld by the Supreme Court of the United States. *United States v. 3 tons of coal*, 28 Fed. Cas. 157; *Pittsburg Molding Co. vs. Totten*, 248 U. S. 1, 63 L. Ed. 97; *United States vs. Cudahy Packing Co.*, 243 Fed. 441.

It is respectfully submitted, in view of all the foregoing, that the judgment of the trial court should be affirmed.

Respectfully Submitted.

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